STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Hoekstra, Griffin and Borello, JJ.

MARCIA VAN TIL,
Plaintiff-Appellant,

vs.

ENVIRONMENTAL RESOURCES MANAGEMENT, INC.,
Defendant-Appellee,

No. 128283

Court of Appeals
No. 250539

Ottawa Circuit
No. 02-042717-NO

JOHN R. JACOBS,
Plaintiff-Appellee

V

TECHNIDISC, INC. and
PRODUCER'S COLOR SERVICES, INC.,
Defendants-Appellees

And

MICHIGAN MUTUAL INSURANCE COMPANY,
n/k/a **AMERISURE MUTUAL INSURANCE COMPANY,**
Defendant.

No. 128715

Court of Appeals
No. 258271

Oakland Circuit Court
No. 91-405664

SUPPLEMENTAL BRIEF ON APPEAL

AMICUS CURIAE
MICHIGAN DEFENSE TRIAL COUNSEL, INC.

HAL O. CARROLL (P11668)
Vandeveer Garzia, P.C.
Counsel for Amicus Curiae
Michigan Defense Trial Counsel, Inc
1450 W. Long Lake Rd, Suite 100
Troy, MI 48098
(248) 312-2800

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BASIS OF APPELLATE JURISDICTION

This Court granted leave to appeal on November 3, 2005.

QUESTION INVOLVED

IN A CIVIL CASE, MAY A TRIAL COURT DETERMINE WHETHER THE FACTUAL BASIS FOR ITS JURISDICTION EXISTS, WHEN ITS JURISDICTION DEPENDS UPON WHETHER THE PLAINTIFF WAS AN EMPLOYEE OF THE DEFENDANT?

Plaintiff-Appellee says:	YES
Defendant-Appellant says:	YES
The Trial Court said:	YES
The Court of Appeals said:	YES
Amicus Curiae says:	YES

STATEMENT OF FACTS

Note: for the following statement of facts, Amicus Curiae relies upon the opinion of the Court of Appeals.

Plaintiff-Appellant Marcia Van Til was helping her husband remove wax from a mailroom floor. Her husband was an employee of Defendant-Appellee Environmental Resources Management, Inc. (ERM). She suffered injuries to the skin on her legs, caused by the chemicals used to remove the wax.

Plaintiff sued, alleging that Defendant had a duty to warn her of the danger presented by the chemicals. Defendant ERM moved for summary disposition pursuant to MCR 2.116(C)(4), arguing that Plaintiff was its employee and suit was barred by the exclusive remedy provision of the Worker Disability Compensation Act, MCL 418.131 et seq.

The trial court denied ERM's motion, holding that Plaintiff was a gratuitous worker and not an employee. ERM then moved for reconsideration, arguing that it was a "statutory employer," because her husband was a contractor to ERM and she worked for him. The trial court then granted ERM's motion.

Plaintiff appealed and the Court of Appeals affirmed. The court held that "the evidence demonstrates that defendant expected to pay for plaintiff's services, while plaintiff's testimony reveals that she expected compensation in return for these services." Opinion p 4. Plaintiff did not receive a paycheck for her services, but under an arrangement with ERM, "her husband put her hours on his timesheet and got paid by defendant for those hours." *Id.* The Court of Appeals concluded that these facts satisfied the "contract of hire" requirement of MCL 418.161(1)(*l*).

This Court granted leave on November 3, 2005, also inviting amicus curiae briefs from interested parties, including Michigan Defense Trial Counsel, Inc.

SUMMARY OF ARGUMENT

Sewell v Clearing Machine Corporation, 419 Mich 56; 347 NW2d 447 (1984) should not be overruled because there is no textual foundation for doing so. The argument for the proposed new rule, in addition to rejecting the context provided by the constitution, by the provisions of the RJA relating to courts, and by other provisions of the WDCA, also applies an interpretation of the second half of the sentence that makes the first half of the sentence surplusage.

If *Sewell* is overruled, it will disrupt all existing cases in which a trial court has ruled on its own jurisdiction. All such cases currently in progress would have to be dismissed or referred to the Agency for a determination of the employment relationship.

Even if the overruling is made prospective, the real world disruptions will be extensive. First, the trial courts will lose the previously-unquestioned right to determine their own jurisdiction. Looking only at the procedural effects, this will require that whenever the issue is raised, the trial court has no discretion and no judicial power, but must defer to the Agency for a determination. Thus, the issue can never be resolved by motion in the trial court; instead there must be a removal procedure to invoke the preemptive jurisdiction of the Agency.

The premise on which it is proposed that *Sewell* be overruled is that the WDCA requires that "all questions arising under this act" be resolved by the Agency. This will require that

1. any claim that a defendant is entitled to the exclusive remedy provision under the economic reality doctrine must be determined by the Agency,
2. any claim that the defendant is a "statutory employer" must be determined by the Agency, and
3, any claim for damages for "retaliatory discharge," a cause of action created under the WDCA, must be tried (with a jury) by the Agency.

Other areas that will be affected in varying degrees are cases involving contribution and some indemnity claims.

ARGUMENT

By its order of May 12, 2006, this Court ordered the parties and invited the amici curiae to submit supplemental briefs on two issues under *Robinson v City of Detroit,* 462 Mich 439; 613 NW2d 307 (2000): (1) the effect of overruling *Sewell v Clearing Machine Corporation,* 419 Mich 56; 347 NW2d 447 (1984) on "reliance interests," and (2) whether overruling *Sewell* would produce "real-world dislocations."

I. *SEWELL* SHOULD NOT BE OVERRULED.

A. The Statutory Text Does Not Support the Proposed Rule.

Although this Court's order of May 12 did not request that the parties address the issue whether *Sewell* was correct, it is appropriate to address briefly the substance of the theory put forth as the basis for attacking *Sewell.* Under *Robinson*, this is the first issue, which must be decided before any other. 462 Mich at 464.

The proposed rule is justified as an application of a textual analysis of the statute. It is not. This must be said as forcefully as possible. What is claimed by the proponents of the rule to be "textualism" is not that at all. "Textualism" is textual analysis, and the proposed rule is neither textual nor analysis. Instead of "textualism," it is "phrasism." Instead of textual analysis it is "phrase mining," a search for a convenient phrase to support a desired position.

Phrase mining is not a new phenomenon. When the issue arises under common law, it is common to find arguments that draw upon a choice phrase in a case, extracting the phrase from the facts that give it meaning. Common law proceeds by adopting rules based upon factual situations. A phrase lifted out of a case becomes disembodied text, deprived of meaning.

Statutory phrases also exist in context. Some of that context comes from the common law the statute is written to change, but primarily the context comes from other statutory words. Where a phrase or sentence in a case derives meaning from the facts that surround it, a phrase or sentence in a statute derives meaning from the other words in the statutes. It follows that when a phrase is separated from the text in which it exists, its meaning is at least diminished and often changed. It also follows that relying on a phrase, rather than on the text of the statute, is not textualism at all, but mere "phrasism."

Context is essential. This amicus has argued in its prior brief that the context in which the extracted phrase at issue here must be read is provided by (1) the constitution's provisions for jurisdiction; (2) the Revised Judicature Act, which until now has always been treated as the source of law defining the judiciary; (3) and the WDCA itself. To ignore any of those is to abandon, rather than to apply, textualism. For those sources of text, Amicus relies on its prior brief.

But even if we were to ignore all of those, and even if we ignore the context provided by the text of the entire **section** of the WDCA from which the favored phrase has been extracted by the proponents of the new rule, at least it is necessary to read the whole **sentence** in which the phrase resides. That sentence reads:

> (1) Any dispute or controversy concerning compensation or other benefits shall be submitted to the agency and **all questions arising under this act** shall be determined by the agency or a worker's compensation magistrate, as applicable.
>
> MCL 418.841(1) (emphasis added)

If we assume that the favored phrase in the second half of the sentence means what the new rule's proponents claim it means, then the first half of the sentence is meaningless. Surely a "dispute or controversy concerning compensation" is a question that "aris[es] under this act." Likewise a dispute over "benefits" "aris[es] under" the WDCA. Yet if the favored phrase means

what the proponents claim, then the second half of the sentence negates the first. It is perhaps possible that the legislature – whose collective will is supreme in this matter – might have labored over the first half of the sentence and then promptly moved on to make its own work meaningless in the second half, but it seems unlikely. The strict formulation of this concept is the principle that when a court interprets a statute, it must read it so as to give all parts meaning. "[W]e are bound by oath to give meaning to every word, phrase and clause in a statute. Said conversely, we cannot render parts of the statute surplusage or nugatory." *Reed v Yackell,* 473 Mich 520, 537; 703 NW2d 1 (2005).

Thus, the suggestion that the overruling of *Sewell* must follow from the application of "textualism" is plain wrong. Even at the level of this one sentence in the WDCA, "textualism" is not invoked to enforce the whole statute, but to thwart a part of it.

On the other hand, if the second part is read in context – that is, if a textual analysis is applied -- it has a simple meaning which is consistent both with common sense and with the text. The Agency has jurisdiction over any dispute or controversy concerning compensation or other benefits and over any related questions concerning either. Questions such as procedure, discovery, and evidence, for example, as they relate to a dispute over compensation or other benefits, are within the purview of the Agency because those questions arise under the act.

The result is a rule that is simple, straightforward and sensible. Even if we ignore the constitution and statutes that define the framework of Michigan's judicature, and look only at one sentence, the same result follows. That is why *Sewell* is correct.

The fundamental point is that the phrase upon which the proposed rule is based cannot reasonably be read to have the broad effect claimed for it and the proposed rule cannot be defended on its merits.

B. Reliance Interests Will Be Adversely Affected.

Robinson also enunciates a "reliance" issue. If the court has determined that a rule is subject to be overruling, it "must proceed to examine the effects of overruling, including most importantly the effect on reliance interests and whether overruling would work an undue hardship because of the reliance." *Robinson* at 466.

This question does not require much discussion. For any pending case in which a trial court has ruled that it has jurisdiction because there was no employment relationship, to rule, effective immediately, that the court lacked jurisdiction to decide that issue would cause serious disruption. As is explained below, the very premise of the proposed rule is that the court lacks the jurisdiction to decide that issue, and any act done by a court without subject matter jurisdiction is void. "When a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it, is absolutely void." *Fox v Board of Regents,* 375 Mich 238, 242; 134 Mich 146 (1965).

Since the premise of the rule is that the circuit or district court lacks jurisdiction to decide the question that is the threshold to the existence of its subject matter question, any act that the trial court took after exceeding its authority would logically be void as well. At least that will be the issue raised by defendants in every such case, and one which will necessarily work its way through the appellate system.

This fact would argue for adopting the new rule prospectively. Whether the rule is prospective or retrospective, the long term effect of the proposed rule will cause serious practical real-world dislocations. These are discussed in the next section in various factual contexts.

II. THE REAL-WORLD DISLOCATIONS OF THE RULE WILL BE SEVERE.

To restate the core of the proposed rule: The question whether there is an employment relationship "arises under" the WDCA, and therefore must be decided by the Agency, and cannot be decided by the courts. The premise of the proposed rule will cause serious problems.

A. THE TRIAL COURT CANNOT DETERMINE ITS OWN JURISDICTION.

Until now, no one has ever questioned the principle that a court determines its own jurisdiction. Actually, it is not easy to find cases that affirm this principle, but that is likely because no one has ever doubted it until now. Still, one case states the rule, though it mentions it as an understood principle, not one that needed discussion.

> It must be admitted that the circuit court had power to decide upon its own jurisdiction, subject to review, of course, and to investigate such facts and in such mode as the attainment of the end called for.
> *Haywood v Johnson,* 41 Mich 598, 606; 2 NW 926 (1879).

As difficult as it is to find a case that states the principle, it is impossible to find one that **denies** it. It has never been questioned until now. But if this Court adopts the proposed rule, it will for the first time create an exception. The following set of fact situations will illustrate.

1. Plaintiff Sues a Business.

This is how the proposed rule will work, using the circuit court as an example:

1. Plaintiff sues Defendant, a business, in circuit court.

2. Defendant, believing there is an employment relationship, asserts the exclusive remedy defense. Defendant files a motion for summary judgment on the issue of subject matter jurisdiction, asserting that Plaintiff is an employee.

3. Question: Does the issue whether Plaintiff is an employee "arise under" the WDCA? Under the proposed rule, it does.

4. Question: Does the issue whether Plaintiff is an employee go to the court's jurisdiction? Obviously it does. *Harris v Vernier,* 242 Mich App 306; 617 NW2d 764 (2000).

5. Can the circuit court answer this question? Under the proposed rule, obviously it cannot, because the existence of the employment relationship is a "question[] arising under this act," and only the Agency can answer it.

Therefore, under the proposed rule the circuit court has lost the power to determine its own jurisdiction. Note that Amicus Worker Compensation Section is quite candid about this effect. In the supplement brief filed on or about May 15, 2006, at page 2 after citing an Arkansas case, the brief says that the case "refutes the argument that was presented by amicus curiae Michigan Defense Trial Counsel that a circuit court could decide its own jurisdiction." That is precisely the point. Under the proposed rule, this principle of law, unquestioned until now, will disappear in this type of situation.

2. Plaintiff Sues an Individual.

There is a variant of this scenario where the plaintiff sues a person, who then argues that he or she is a co-employee. *Harris v Vernier* was such a case, where the defendant learned of the possible application of the exclusive remedy defense relatively far along in the trial court. In this scenario, the defendant co-worker, who is not liable for compensation payments, nonetheless must transfer the case to the Agency for a determination. While a defendant who asserts the defense as an employer would become liable for compensation payments, a co-employee would not. The reference to the Agency would be purely for an advisory opinion, since the Agency cannot award either damages or statutory compensation.

3. The Removal or Referral Procedure.

Since the unavoidable result of the rule is, as the Worker Compensation Section agrees, that the circuit court cannot determine its own jurisdiction in this type of case, the defendant – employer or co-employee – cannot proceed by motion in the trial court. A motion necessarily implies the power to make a decision, but the very premise of the proposed rule is that the court lacks that power. It could no more rule on the employment issue than could a state court where the defendant asserts diversity of citizenship. In that situation the only procedure that is compatible with the superior jurisdiction of the federal courts is removal. In this situation, the superior jurisdiction rests with the Agency. The only proper procedure is some form of removal.

The defendant claiming the exclusive remedy defense would serve notice on the trial court that it was invoking the superior – in fact, the exclusive – jurisdiction of the Agency. The current court rules are not adequate to the application of the proposed rule. It will be necessary for this Court, invoking its rulemaking powers, to define a removal procedure.

4. Delay While Litigation Awaits Agency Rulings.

Once invoked, the exclusive jurisdiction of the Agency requires that the Agency's procedure apply fully. Thus, the decision of the magistrate would be subject to appeal to the Appellate Commission and thereafter by leave to the Court of Appeals and this Court. The appellate process of the Agency tends to run considerably slower than the courts.

During this process, the trial court action is either stayed or dismissed. If there is only one defendant and one plaintiff, the trial court action could be treated as dismissed without prejudice, or stayed. If it is treated as dismissed without prejudice then it would be necessary to state clearly that the statute of limitations is tolled while the case works its way through the Agency.

5. Effect on Other Litigants in Multiple Party Cases.

Multiple Defendants: But if there are two defendants, only one of whom could claim the exclusive remedy defense, then it is necessary to define what happens to the other defendant while the Agency process is at work. The case cannot proceed against the remaining defendants, because the jury would not be able to assess fault against the defendant who has asserted the exclusive remedy defense. Therefore, a stay would be mandatory. Again, the rulemaking power would need to be applied to clarify this procedure.

Multiple Plaintiffs: The same would be true if there were more than one plaintiff and only one is arguably subject to the exclusive remedy defense. The trial court would still have jurisdiction over the putative employer or co-employee, insofar as the remaining plaintiffs are concerned. Would the case then proceed against that defendant while the employee-plaintiff is in the Agency resolving the issue of jurisdiction?

If this Court adopts the proposed rule and does not also define the new court rules that will give it effect, the result will be chaos. If this Court does define the new procedures, the result will merely be excessive, expensive and unproductive delay.

On the other hand, if the court does define the procedures that must put the rule into practice, then the chaos will be reduced and only excessive and unproductive delay will remain. However the details are worked out, the proposed rule necessarily inserts a delay of indeterminate period. In a sense, this is an advantage to defendants, to the extent that delay is always a disadvantage to a plaintiff seeking compensation, but any rule, especially a procedural one, ought to be neutral as between litigants. MCR 1.105 expresses the principle that the court rules "are to be construed to secure the just, speedy and economical determination of every action." That principle is not, or ought not be, confined to the court rules only, but is a general

principle of jurisprudence. If a rule of law is going to be adopted which runs directly counter to that principle, by inserting a collateral process, there ought to be a clear statutory mandate. As is explained in the first section of the brief, there is none.

B. THE ECONOMIC REALITY DOCTRINE MUST BE APPLIED BY THE AGENCY.

Again, the premise of the proposed rule is that "all questions arising under th[e] act" must be determined by the Agency. When **any** defendant invokes the exclusive remedy protection, it is invoking a protection that is created by the WDCA and the issue it raises therefore "aris[es] under" the WDCA.

The economic reality doctrine has a long and complicated history. It is applied to determine whether a particular defendant is the employer for purposes of the exclusive remedy protection. It applies in **labor broker cases**, *Kidder v Miller-Davis Company*, 455 Mich 25, 35; 564 NW2d 872 (1997); **parent-subsidiary cases**, *Wells v Firestone,* 421 Mich 641; 364 NW2d 670 (1984), *Verhaar v Consumers Power,* 179 Mich App 506; 446 NW2d 299 (1989), *Maki v Copper Range Co,* 121 Mich App 518; 328 NW2d 430 (1982), leave denied 417 Mich 1031 and *Pettaway v McConaghy,* 367 Mich 651; 116 NW2d 789 (1962); **sister corporation cases,** *James v Commercial Carriers,* 230 Mich App 533, 542; 583 NW2d 913 (1998), and a grab bag of others, *e.g., Bitar v Wakim,* 456 Mich 428; 572 NW2d 191 (1998).

It is true that the rule is a judicial gloss on the statute, but the statute on which it is a gloss is the WDCA. A common theme in the analysis the cases apply is whether the entities share worker compensation insurance in some way. "In most of the cases, a salient factor has been the use of a combined worker's compensation insurance policy . . ." *Verhaar* at 509.

The procedural problems here parallel those in the preceding section. The defendant will raise in the trial court the argument that it is entitled to exclusive remedy protection **under the**

WDCA. That issue, "arising under" the WDCA, is outside the jurisdiction of the civil courts, so it must be removed to or referred to the Agency. There is no sound analytical or juridical basis for distinguishing between these cases and the first category (where there is a single putative employer. It might be argued that in the first scenario (plaintiff suing putative employer) the issue is whether the plaintiff is an employee, while this issue usually arises where the issue is not the employment relationship itself, but a relationship between entities claiming to be employers. That is a distinction without a difference, because the premise that drives the proposed rule is that the favored phrase "all questions arising under this act" compels the result. The entitlement to a benefit (protection from liability) that is conferred only by the WDCA cannot be anything other than a question arising under the WDCA.

Many more cases than *Sewell* must be overruled if the proposed rule is adopted.

C. STATUTORY EMPLOYER CLAIMS MUST BE DECIDED BY THE AGENCY.

MCL 418.171 creates the category of "statutory employer," where a subcontractor fails to provide workers compensation insurance.

In *Burger v Midland Cogeneration Venture,* 202 Mich App 310; 507 NW2d 827 (1993) the circuit held, on appeal from the circuit court, that the defendants were entitled to the exclusive remedy protection because they were "statutory employers." In *Sexton v JIT, Inc,* 200 Mich App 52; 504 NW2d 16 (1993), the Court of Appeals, on remand from this Court, held that the defendant was not a "statutory employer." This Court had vacated the previous unpublished opinion in lieu of granting leave, 441 Mich 928; 498 NW2d 737. The case originated in Wayne County Circuit Court.

These two cases are also wrongly decided, if the proposed rule is correct. Like the exclusive remedy protection itself, the category of statutory employer is a creation of the

WDCA. It is logically and inevitably a question arising under the WDCA, and therefore confided to the exclusive jurisdiction of the Agency.

D. CLAIMS FOR RETALIATORY FIRING MUST BE HANDLED BY THE AGENCY.

MCL 418.301(11) of the WDCA creates a cause of action for retaliatory firing.

> A person shall not discharge an employee or in any manner discriminate against an employee because the employee filed a complaint or instituted or caused to be instituted a proceeding under this act or because of the exercise by the employee on behalf of himself or herself or others a right afforded under this act.

This has been the basis of several claims in civil court. Two are in federal court: *Dortman v ACO Hardware,* 2005 WL 3289276 (ED Mich 2005), and *Chisolm v Michigan AFSCME Council 25,* 218 F Supp 2d 855 (ED Mich 2002).

Michigan's courts have all handled this type of case. *Chiles v Machine Shop, Inc,* 238 Mich App 462; 606 NW2d 398 (1999), *Lamoria v Health Care & Retirement Corp,* 233 Mich App 560; 593 NW2d 699 (1999), lv den 461 Mich 879; 603 NW2d 266, *Phillips v Butterball Farms Co,* 448 Mich 239; 531 NW2d 144 (1995), *Dunbar v Dept of Mental Health,* 197 Mich App 1; 495 NW2d 152 (1992), lv den 442 Mich 913; 503 NW2d 447, *Griffey v Prestige Stamping, Inc,* 189 Mich App 665; 473 NW2d 790 (1991), and *Wilson v Acacia Park Cemetery Assn,* 162 Mich App 638; 413 NW2d 79 (1987).

As with the statutory employer issue, there cannot be a clearer case of a "question[] arising under this act" than the enforcement of a right specifically created by the act. Under the proposed rule, these cases would have to be filed and tried in the Agency before a magistrate. Under the proposed rule, these cases did not properly belong in the civil courts at all, and each of the cases described above was wrongly decided.

This situation differs somewhat in two respects. First, since this is a claim for monetary damages, it will be necessary for this Court to confirm the authority of the Agency to award damages. Also, since the Agency is not equipped to handle jury trials, that issue must also be resolved, in light of the constitutional guarantee of the right to trial by jury.

> Sec. 14. The right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law. In all civil cases tried by 12 jurors a verdict shall be received when 10 jurors agree.
> Const 1963, Art. 1, sec 14

A straightforward textual analysis of this language compels the conclusion that where there is a civil claim, "[t]he right to trial by jury shall remain." This creates a conflict with the proposed rule. One way to resolve that is to allow jury trials in the Agency, with a magistrate presiding, and the full scope of review permitted by the Appellate Commission.

The second difference is that cases of this type can involve diversity of citizenship and can be filed in or removed to federal court. How that will work in the context of a state law that holds that civil courts have no jurisdiction will necessarily be worked out in the federal courts.

E. CONTRIBUTION CLAIMS MUST BE DECIDED BY THE AGENCY.

Contribution claims have survived tort reform, at least in some circumstances. *Gerling Konzern v Lawson,* 472 Mich 44; 693 NW2d 149 (2005). But contribution is barred against an employer, *Williams v Unit Handling Systems Div of Litton Systems, Inc,* 433 Mich 755, 760; 449 NW2d 669 (1989) so if one defendant seeks contribution against another, and the other asserts that it was the employer, that issue, too, must go to the Agency.

F. SOME INDEMNITY CLAIMS MUST BE DECIDED BY THE AGENCY.

Indemnity claims present a mixed picture, both because there are three different types and because the availability of the exclusive remedy is unclear in two of them.

1. Common Law Indemnity.

The cases have not been entirely clear on the availability of the exclusive remedy defense in a claim for common law indemnity. On the one hand, in *Vaughn v Vakula,* 38 Mich App 368; 196 NW2d 319 (1972), the court stated that "[a]n employer who has paid, or is paying, workmen's compensation benefits to the plaintiff will not be liable for indemnification as a joint tortfeasor." On the other hand, common law indemnity was allowed in *McLouth Steel Corporation v Anderson Construction Corporation,* 48 Mich App 424, 430; 210 NW2d 448 (1973), and in *Ingram v Interstate Motor Freight Systems,* 115 Mich App 559; 321 NW2d 731 (1982). Conversely, in *Williams v Litton Systems,* 433 Mich 755, 761; 449 NW2d 669 (1989) the lead opinion, signed by three justices, states:

> We agree with the Court of Appeals that Litton may not maintain an action for either common-law or implied contractual indemnity to recover amounts paid in settlement or payment of a claim asserting only active fault against Litton, and affirm its decision.

Despite this, the opinion concludes that a person "may seek indemnification from an injured worker's employer only on the basis of express contractual indemnity or where held vicariously liable."

If the exclusive remedy defense is available in a claim for common law indemnity, then that issue, too, must go to the Agency as one that arises under the WDCA.

2. Implied Contractual Indemnity.

Implied contractual indemnity also presents a confused picture. *Hill v Sullivan Equipment Co,* 86 Mich App 693; 273 NW2d 527 (1978) allowed it against an employer, but in *Langley v Harris Corp,* 413 Mich 592; 321 NW2d 662 (1982), the Supreme Court declined to allow implied contractual indemnity to override the workers compensation exclusive remedy

provision where the defendant corporation's liability was based on the successor liability concept of *Turner v Bituminous Casualty Co,* 397 Mich 406; 244 NW2d 873 (1976).

3. Contractual Indemnity.

There should not be a problem where the claim is for contractual indemnity because the exclusive remedy provision is not a defense to a contract action.

G. INTENTIONAL TORT CLAIMS.

Intentional tort claims appear to be a special case. On the one hand, the right they seek to enforce is created by the act and is therefore unquestionably a "question[] arising under this act."

On the other hand, the section that defines the right to sue specifically says that the issue is one of law "for the court." Under the rationale of the proposed rule, therefore, presumably this would qualify as an exception to the exception, that is, a return to the court of a piece of the jurisdiction more broadly taken away from the courts' traditional common law jurisdiction. A more sensible view is that the purpose of this sentence was to make the issue one of law rather than one of fact, not that it was intended as part of a complex legislative scheme to shuttle jurisdiction back and forth.

SUMMARY

This list of areas discussed above, where the proposed rule would disrupt the established and orderly judicial process and thereby cause real-world dislocations, does more than merely list practical problems. It reinforces the weakness of the rationale that underlies the proposed rule, which unavoidable constructs a complicated analytical structure on a single phrase.

It is easy, and indeed facile, to take a phrase out of context and interpret it in isolation from the text in which the legislature placed it, but to do so is to abandon, not apply, a textual

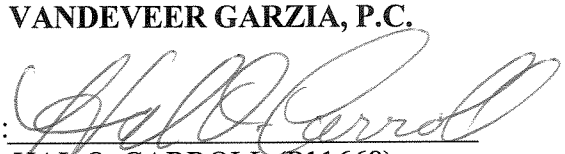
analysis. More significantly, doing so in this case results in an interpretation that does violence to the fabric of the law, and the text of the act itself, even if we look only at the sentence in which the chosen phrase resides.

RELIEF REQUESTED

Amicus Curiae Michigan Defense Trial Counsel, Inc. requests that this Court affirm that the trial court and the Court of Appeals had jurisdiction to determine the question whether Plaintiff was an employee.

Respectfully submitted,

VANDEVEER GARZIA, P.C.

By: 

HAL O. CARROLL (P11668)
Attorneys for Amicus Curiae
Michigan Defense Trial Counsel, Inc.
1450 West Long Lake Road, Suite 1090
Troy, Michigan 48098-6330
(248) 312-2800

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